Supreme Court, U.S.
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No. 95 -- _____

In The

Supreme Court of the United States

October Term, 1995

HARVEY M. ALPER, HENRY P. TRAWICK, JR., AND JOSEPH W. LITTLE,

Petitioners,

vs.

THE STATE OF FLORIDA (THE FLORIDA BAR),

Respondent.

Petition for a Writ of Certiorari
to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. **Does the First Amendment place any limit upon the political agenda and political activities of The Florida Bar, which is a state agency of the State of Florida created, supervised and regulated by the Supreme Court of Florida, and which holds itself out as the political representative of all the lawyers in the state, as long as the state compels all lawyers to be "members" of The Florida Bar even though they disagree with its political agenda and activities?**

2. **As long as the State compels all lawyers to be "members" of The Florida Bar even though they disagree with its political agenda and activities, does the First Amendment restrict The Florida Bar from adopting and promoting a political agenda to amend the constitution of the State to eliminate contested elections of trial judges, and does the First Amendment restrict The Florida Bar from undertaking to promote the retention elections of supreme court justices and judges of district courts of appeal?**

3. **If the Answer to the foregoing question is no, must The Florida Bar rebate a prorated portion of compelled dues to members who object to these specific aspects of The Florida Bar's political agenda and activities?**

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners, Harvey M. Alper, Henry P. Trawick, Jr. and Joseph W. Little were petitioners before the Supreme Court of Florida in proceedings below.

The State of Florida in the person of The Florida Bar was respondent in the proceedings below

Table of Contents

Questions Presented for Review i

List of All Parties to the Proceeding ii

Table of Citations iv

Order Below vi

Statement of Jurisdiction vi

Statement of Case 2

Facts Material to the Questions Presented . . 2

Reasons for Granting the Writ 22

Conclusion 42

APPENDIXES

Appendix A- Order of the Supreme Court 1a

Appendix B - Petitioners; Petition in the Supreme Court of Florida (including exhibits 2,3,4,5,6 and 12) 3a

Appendix C - Response of The Florida Bar 39a

TABLE OF CITATIONS

Cases Cited:

Abood v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed 2d 261 1977) 10, 22, 23, 24

Carroll v. *Blinken*, 957 F. 2d 991 (2nd Cir. 1992), ... 33, 36, 37, 38, 41

Ex Parte Carter v. *Forester*, 395 So. 2d 65 (Ala. 1970) 32

Gibson v. *The Florida Bar*, 798 F. 2d 1564 (11th Cir. 1986) 10

Gibson v. *The Florida Bar*, 906 F. 2d 624 (11th Cir. 1990), cert. dismissed, 502 U.S. 104, 112 S.Ct. 633, 16 L.Ed.2d 432 (1991) 12

In re Florida Board of Bar Examiners, 353 So. 2d 98 (Fla. 1977) 3

Kaimowitz v. *The Florida Bar*, 996 F.2d 1151, 1155 (11th Cir. 1993) 2

Keller v. *State Bar of California*, 496 U.S. 1. 110 S. Ct. 2228, 110 L.Ed 2d 1 (1990) ..... 8, 16, 22, 23, 25, ... 26, 27, 28, 29, 33, 34, 36, 40,41 40, 41

Lathrop v. *Donohue*, 367 U.S. 820, 81 S. Ct. 1826, 6 L.Ed. 2d 1192 (1961) 6,22

Lehnert v. *Ferris Faculty Assn.*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed. 2d 572 (1991) 24, 25

Petition of Florida Bd. of Bar Examiners, 397 So.2d 627 (Fla. 1981) 3

Schneider v. *Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), certiorari denied 502 U.S. 1029, 112 S.Ct. 865, 116 L.Ed 2d 772 (1992) . 32, 33, 34, 36, 41

The Florida Bar Re Frankel, 581 So. 2d 1294, 1295 (Fla. 1991) 13, 15, 16, 26, 28

The Florida Bar Re Schwarz, 526 So. 2d 56 (Fla. 1988) 10

The Florida Bar Re Schwarz, 552 So. 2d 1094, 1094 (Fla. 1989) 1, 12, 27, 28

The Florida Bar Re: Amendment to Rules Regulating The Florida Bar, 605 So. 2d 252, 255 (Fla. 1992). 1, 2

United States Constitution Cited:

First Amendment

Florida Constitution Cited:

Article V § 2 (a) Fla. Const. 5

Article V § 2 (b) Fla. Const. 5

Article V § 10 (a) Fla. Const. 4

Article V § 10 (b) Fla. Const. 4

Article V § 15 Fla. Const. 1

ORDER BELOW

The Order to be reviewed is:

The Florida Bar, Re: Harvey M. Alper, et.al. case No. 84,615, Supreme Court of Florida, January 30, 1995

STATEMENT OF JURISDICTION

(i) Date of Entry of Judgment to be Reviewed:

January 30, 1995

(ii) Reliance on Rule 12.3:
None

(iii) Statutory Provision Believed to Confer Jurisdiction on the Court:

28 U.S.C. § 1257

(iv) Constitutional and Statutory Provisions Involved

First Amendment, United States Constitution:

Congress shall make no law ... abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.

STATEMENT OF CASE

Facts Material to the Questions Presented

Under the Constitution of the State of Florida, the Supreme Court of Florida possesses exclusive jurisdiction to regulate the admission of lawyers to the practice of law and to discipline those admitted. Article V § 15 Fla. Const. Pursuant to its exclusive regulatory power that court has created a state agency known as The Florida Bar to serve as the court's vehicle for licensing and disciplining lawyers in the state. *The Florida Bar Re: Amendment to Rules Regulating The Florida Bar*, 605 So. 2d 252, 255 (Fla. 1992). The Supreme Court of Florida has described the status of The Florida Bar as follows: "As a creation of this Court, The Florida Bar is under our supervision and subject to our regulation." *The Florida Bar Re Schwarz*, 552 So. 2d 1094, 1094 (Fla. 1989). At the

assertion of the State, the status of The Florida Bar as a state agency in the judicial branch of government has been judicially settled. *Kaimowitz* v. *The Florida Bar*, 996 F.2d 1151, 1155 (11th Cir. 1993). All licensed lawyers are deemed to be "members" of The Florida Bar, 605 So. 2d at 255 (Rules Regulating The Florida Bar 1-3.1), and The Florida Bar issues each member a membership that must be renewed annually. 605 So. 2d at 260 (Rule 1-7.3). Pursuant to the authority granted it by the Supreme Court of Florida, The Florida Bar collects annual "dues" from each of its "members" as a condition of licensure to the practice of law. Id. Also pursuant to the authority granted it by the Supreme Court of Florida, The Florida Bar adopts a political agenda on a wide range of topics and promotes the agenda through its assumed status as "representative" of its compelled members and through the expenditure of some portion of the compelled dues. 605 So. 2d at 264 (Bylaw 2-3.2). In this regard, The

Florida Bar explicitly holds itself out as the representative of the legal profession in Florida. "Response of the Florida Bar," Case No. 84,615, In The Supreme Court of Florida. Appendix C, pp.49a,52a.

Although the State regulates the annual licensing and disciplining of lawyers through the agency of The Florida Bar, it regulates initial admissions through a separate agency known as the Florida Board of Bar Examiners. The Board of Bar Examiners is also created by court rule as an arm of the Supreme Court of Florida, *Petition of Florida Bd. of Bar Examiners*, 397 So. 2d 627 (Fla. 1981), and is subject to that court's regulatory jurisdiction to the exclusion of the power of the Florida Legislature. *In re Florida Board of Bar Examiners*, 353 So. 2d 98 (Fla. 1977). This petition is concerned solely with state activities conducted through the agency of The Florida Bar and not with those of the Board of Bar Examiners.

Under the constitution of the State of Florida justices of the Supreme Court of Florida are initially appointed by the governor of the state and are thereafter either retained or removed from office at the end of seven year terms by a vote of the electorate of the state in retention elections. Article V § 10 (a) Fla. Const. Justices run on their records and their offices may not be contested by opposing candidates. Judges of the district court of appeal of Florida, a geographical appellate court with heads of both intermediate and final appellate jurisdiction but no regulatory authority, are similarly appointed and retained or removed. Id. by contrast, all trial judges of Florida, comprised of circuit judges of plenary jurisdiction and county judges of inferior jurisdiction, may obtain office initially in contested elections among opposing candidates and must regularly submit to contested elections against opposing candidates to retain office beyond a given term. Article V § 10 (b)

Fla. Const. The chief justice of the Supreme Court of Florida is the "chief administrative officer of the judicial system" and exercises prescribed administrative authority over all courts and judges. Article V § 2 (b) Fla. Const. The Supreme Court of Florida adopts "rules for practice and procedure in all courts" of Florida. Article V § 2 (a) Fla. Const.

Each of the Petitioners has been licensed to practice law in Florida for a large number of years: Petitioner Trawick since 1951; Petitioner Alper since 1971; and Petitioner Little since 1974. All have been extensively active through the years in the affairs of The Florida Bar or local organizations of lawyers in connection with matters pertaining to the licensure or discipline of lawyers, and each Petitioner readily agrees that the State possesses proper purposes in regulating the admission to the practice of law and in disciplining lawyers, including imposing licensing fees to defray the regulation costs.

Nevertheless, on First Amendment grounds Petitioners steadfastly oppose being compelled to be members of any organization with a political agenda as a condition of exercising the right to earn a living by practicing law (or in any other lawful means of livelihood). Petitioners respectfully submit that any such a requirement threatens to destroy the independence of lawyers and the legal profession by government control and coercion, and thereby, threatens to undermine a bulwark of freedom (i.e., independent lawyers) that was at work securing American freedoms before the First Amendment was adopted. Despite these unyielding beliefs, Petitioners ruefully concede that the Court's prior decisions have rejected the most robust sense of liberty that Petitioners espouse. See *Lathrop* v. *Donohue*, 367 U.S. 820, 81 S. Ct. 1826, 6 L.Ed. 2d 1192 (1961)

Because of arguments made by The Florida Bar in the Supreme Court of Florida (See Appendix C),

Petitioners wish to state emphatically what this case is *not about*. Petitioners acknowledge *no limits* on the political agenda and political activities that *private lawyers* as *individuals* or as *voluntary associations of lawyers* (that are free of State compulsion and control) may take as to any issue. Indeed, Petitioners assert that the First Amendment guarantees *private lawyers* as *individuals* and as *voluntary associations of lawyers* unrestricted political freedom in this regard. In fact, Petitioners maintain that State compelled association with the State's political agenda of itself infringes upon the positive unfettered political freedom guaranteed by the First Amendment. Among the private voluntary associations of lawyers that regularly exercise First Amendment political freedoms with great effect are the American Bar Association and the American Trial Lawyers Association. An act of Congress that attempted to compel all lawyers to become members of and pay financial support to a Federal agency

with an institutional political agenda would weaken and not advance the political independence and effectiveness of lawyers. This case seeks to strengthen, not weaken, the political independence and effectiveness of private lawyers and voluntary associations of private lawyers.

This case raises the narrower but nonetheless vital questions this Court left to another day in its decision in *Keller* v. *State Bar of California*, 496 U.S. 1. 110 S. Ct. 2228, 110 L.Ed 2d 1 (1990), namely:

1. Does the First Amendment place any limit upon the political agenda and political activities of The Florida Bar, which is an agency of the State of Florida created, supervised and regulated by the Supreme Court of Florida, and which holds itself out as the political representative of all the lawyers in the State, as long as the State compels all lawyers to be "members" of the The Florida Bar even though they disagree with its political

agenda and activities?

2. As long as the State compels all lawyers to be members of The Florida Bar even though they disagree with its political agenda and activities, does the First Amendment restrict The Florida Bar from adopting and promoting a political agenda to amend the constitution of the State to eliminate contested elections of trial judges, and does the First Amendment restrict The Florida Bar from undertaking to promote the retention elections of supreme court justices and judges of district courts of appeal?

3. If the Answer to the foregoing question is no, must The Florida Bar rebate a prorated portion of compelled dues to members who object to these specific aspects of The Florida Bar's political agenda and activities?

Through the years the State (i.e., The Florida Bar)

has actively and publicly promoted many political agenda that numerous of its members disagree with and find abhorrent. Because of the unremitting forces of need, coercion and inertia most of these agenda have not been challenged in court, but dissenting members have nevertheless mounted several challenges. *Gibson* v. *The Florida Bar*, 798 F. 2d 1564 (11th Cir. 1986) (hereinafter referred to as GIBSON I), held that this Court's decision in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed 2d 261 1977) and other cases limited The Florida Bar's authority to use compelled dues to fund lobbying activities in connection with constitutional amendment referenda pertaining to limitations on damages in medical malpractice actions and to the state's general tax structure. Thereafter, upon petition of a member, the Supreme Court of Florida directed a study of The Florida Bar's political and lobbying authority, *The Florida Bar Re Schwarz*, 526 So. 2d 56 (Fla. 1988), and

subsequently limited The Florida Bar's political authority to matters satisfying one or more of these criteria:

(1) Questions concerning the regulation and discipline of lawyers;

(2) Matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;

(3) Increasing the availability of legal services to society;

(4) Regulation of attorneys' client trust accounts; and

(5) The education, ethics, competency, integrity and regulation as a body, of the legal profession.

[and, outside of the areas identified above

[6] [matters that satisfy these criteria]:

(1) That the issue be recognized as being of great public interest;

(2) That lawyers are especially suited by their training and experience to evaluate and explain the issues, and the subject matter affects the rights of those likely to come into contact with the judicial system.

(3) The subject matter affects the rights of those likely to come into contact with the judicial system.

The Florida Bar Re Schwarz, 552 So. 2d 1094 (Fla. 1989). (Hereafter referred to as *Schwarz II*.)

In the meantime, as a consequence of *Gibson I*, the Supreme Court of Florida approved a revised dues rebate plan, which was largely upheld in *Gibson* v. *The Florida Bar*, 906 F. 2d 624 (11th Cir. 1990), cert. dismissed, 502 U.S. 104, 112 S.Ct. 633, 16 L.Ed.2d 432 (1991) (*Gibson II*).

In *Schwarz II*, the Supreme Court of Florida also prescribed the explicit procedure to be invoked by members who wish to challenge whether The Florida Bar has exceeded the limits of its political authority granted in that decision. The prescribed procedure is that "any member in good standing may question the propriety of any legislative position taken by the Board of Governors

[i.e., the governing board of The Florida Bar] by filing a timely petition with this court [i.e., the Supreme Court of Florida]." 552 So. 2d at 1097. One member successfully invoked the *Schwarz II* petitioning procedure to obtain an order from the Supreme Court of Florida to enjoin The Florida Bar's lobbying efforts in regard to certain child welfare matters which the court found to be "outside the ambit of permissible bar lobbying activities." *The Florida Bar Re Frankel*, 581 So. 2d 1294, 1295 (Fla. 1991). *Frankel* also ordered the Florida Bar to rebate a portion of the petitioning members' dues. Id.

Thereafter, The Florida Bar adopted or continued a political agenda which contain the two political positions which elicited this litigation:

> First, The Florida Bar supported a plan to amend the constitution of the State of Florida by referendum to eliminate the contested election of trial judges and

replace contested elections with an appointment-retention referendum scheme. Appendix B, p.5a.

Second, The Florida Bar regularly promotes the retention elections of justices of the Supreme Court of Florida and judges of district courts of appeal by widely disseminating to news media and local bar associations favorable biographical information about the merit retention incumbents, model resolutions to endorse the candidates, model letters to be sent to local news media, model speeches and related information. Appendix B, pp.5a,6a.

Both of these measures are plain attempts to influence the legislature or the public to endorse the State's political agenda which Petitioners oppose. Petitioners also believe them to be pure political and

ideological activities of a sort that the First Amendment denies the State the power to involve itself in as long as it also compels Petitioners to be members of The Florida Bar as a condition of engaging in the practice of law as a livelihood. Needless to say, Petitioners also object to being compelled to pay dues to support this agenda and these activities.

Invoking the review procedure prescribed by the Supreme Court of Florida in *Schwarz II* and successfully employed in *Frankel*, Petitioners filed a "Petition to Enjoin The Florida Bar from Engaging in Unauthorized Activities That Violate Petitioners' Rights Under the First and Fourteenth Amendments to the United State Constitution" in the Supreme Court of Florida. Appendix B. That petition set out the foregoing matters in detail, supported them with exhibits, and made the following demand:

> ... Petitioners seek an order from this Court to the Florida Bar clarifying that it has no authority or power to employ any funds,

> personnel, property, symbols or other evidences of Bar involvement in promoting or advocating any change in the means by which judges are selected in Florida, and seek an order to The Florida Bar clarifying that is has no authority or power to employ any funds, personnel, property, symbols or other evidences of Bar involvement in promoting or publicizing the merit retention elections of incumbent justices and judges.

Appendix B p.13a. In their original proceeding in the Supreme Court of Florida Petitioners explicitly raised the First Amendment questions that are the subject of this petition, as follows:

> Petitioners seek a declaration that a current legislative position and current political activities of The Florida Bar authorized, approved and supported by the Board of Governors are both outside the limits permitted them by this Court's holdings in *Schwarz* and *In re Frankel*, 581 So.2d 1294 (Fla. 1991) and also violate their rights guaranteed by the First and Fourteenth Amendments to the United States Constitution under the holding of the United States Supreme Court in *Keller* v. *State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228 (1990).

Appendix B, pp.4a,5a.

Petitioners also filed a motion requesting oral argument on the petition.

The Supreme Court of Florida issued an order directing The Florida Bar to respond to the petition. In its response, The Florida Bar defended the merits of the political position it had taken on the proposal to amend the constitution of the State of Florida to change the means by which trial judges are selected, saying in part:

> Whether or not one believe that merit retention actually results in improvement, it nevertheless is a matter *relating* to the improvement of the functioning of the courts, judicial efficacy and efficiency. [i.e., No. 2 of the *Schwarz II* activities] ....
>
> The point is not whether lawyers can prove that the opinions they reach are the correct ones, but *whether the collective opinion of the organization which represents the State's lawyers* would be of special value to the Legislature and the public in reaching their decisions.

"Response of The Florida Bar", Case No 84,615, In the

Supreme Court of Florida. Appendix C, p.p. 51a,53a,54a. (Underlining supplied.)

As to Petitioners' objection to The Florida Bar's activities to promote merit retention candidates, The Florida Bar responded:

> Petitioners incorrectly characterize the informational material distributed by the Bar prior to the last merit retention election. Petitioners state that the materials are an indirect effort "to support the reelection of justices and judges of the district courts of appeal" by publicly distributing "favorable information" about such candidates and that the Bar has done so "in connection with its political support of justices and judges in merit retention elections * * *" In reality, the board took no vote favoring or opposing any candidate and the materials distributed are entirely neutral, suggesting no support for or opposition to any judicial candidate. The materials, copies of which are attached to the Petition as exhibits, include a pamphlet consisting of an explanation of how the merit retention system works and objective biographical sketches on each justice or judge standing for retention election.
>
> In addition to the pamphlets, the Board

> sent to voluntary bar presidents and executives a packet of material for their use in assisting to educate the public as to the nature of merit retention elections. The packet included extracts from the Florida Constitution, Code of Judicial Conduct, and Florida Statutes applicable to merit retention elections, and the 1994 Bar poll results on merit retention candidates. The packet also included several generic fill-in-the blank forms for local voluntary bar associations to use should they decide to endorse particular judicial candidates. The materials are objective and informational and fall within the scope of the *Schwarz* criteria as "matters relating to the improvement of the functioning of the Courts, judicial efficacy and efficiency," and as matters about which "lawyers are especially suited by their training and experience to evaluate and explain."

"Response of the Florida Bar," Case No. 84,615 In the Supreme Court of Florida.

Appendix C, p.p.53a-55a.

Thereafter, on January 30, 1995, the Supreme Court of Florida denied Petitioners' petition for relief with no opinion and without having permitted Petitioners to be heard in oral argument. Consequently, the Supreme

Court of Florida of itself made no findings of fact. Although the procedural niceties of original proceedings in that court are poorly developed in the law of Florida, Petitioners construe The Florida Bar's response to be in the nature of a motion to dismiss, thus accepting Petitioners' factual allegations as true. Indeed, in its "Response to the Petition," The Florida Bar did not take issue with Petitioners' factual allegations but merely sought to characterize the legal effect of The Florida Bar's political agenda and activities in a different light. Accordingly, Petitioners now petition this Court seeking a writ of certiorari to the Supreme Court of Florida to permit this Court to undertake a review of the important First Amendment questions raised below.

REASONS FOR GRANTING THE WRIT

QUESTIONS PRESENTED

1. **Does the First Amendment place any limit upon the political agenda and political activities of The**

Florida Bar, which is a state agency of the State of Florida created, supervised and regulated by the Supreme Court of Florida, and which holds itself out as the political representative of all the lawyers in the state, as long as the state compels all lawyers to be "members" of The Florida Bar even though they disagree with its political agenda and activities?

2. **As long as the State compels all lawyers to be "members" of The Florida Bar even though they disagree with its political agenda and activities, does the First Amendment restrict The Florida Bar from adopting and promoting a political agenda to amend the constitution of the State to eliminate contested elections of trial judges, and does the First Amendment restrict The Florida Bar from undertaking to promote the retention elections of supreme court justices and judges of**

district courts of appeal?

3. **If the Answer to the foregoing question is no, must The Florida Bar rebate a portion of compelled dues to members who object to these specific aspects of The Florida Bar's political agenda and activities?**

This case raises questions left unresolved by this court in *Keller* v. *State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed. 2d 1 (1990) and the long series of First Amendment cases that preceded *Keller*. In *Keller*, this Court stated:

> Petitioners challenge not only their "compelled financial support of group activities," see *supra*, at 2233, but urge that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*. The California courts did not address this claim, and we decline to do so in the first instance.

496 U.S. at 17, 110 S.Ct. at 2238, 110 L.Ed. 2d at 17. (Underlining supplied.) The Supreme Court of Florida has now addressed this question in the concrete proceedings below, giving rise to this petition.

As a preliminary matter, Petitioners restate the limits of compelled association in an integrated bar as set forth by this Court in *Keller*:

> Here [i.e., in *Keller*] the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal service.

496 U.S. at 13, 110 S.Ct. at 2236, 110 L.Ed. 2d at 13.

In regard to this limit, Petitioners respectfully submit that two major factual differences distinguish the permissibly activities of an "integrated bar" with the status and powers of The Florida Bar from those of private labor organizations such as those in *Abood* and the other labor

cases. First, the labor organizations are *private* associations that laboring people may join or not as they see fit. Even in closed shop states, refusal to join a union does not foreclose the right of a worker to employment in every employment in the state or in self-employment. *Abood* and other labor cases such as the more recent *Lehnert* v. *Ferris Faculty Assn.*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed. 2d 572 (1991) deal with the less intrusive issue of State compelled payment of agency shop fees in lieu of membership dues to defray certain activities of unions that have been chosen as bargaining agents for all employees, including non-union members. By contrast, The Florida Bar is not a private organization but is a creation of and agency of the State. It has no functions except those the State authorizes. Lawyers in Florida are compelled to become members and pay dues as a condition of earning a living in the practice of law anywhere in the State, including as self-employed lawyers.

Second, the compelling state interest that this Court's labor cases hold to be sufficient to justify a state law extracting fees in lieu of dues from non-union members is "the government's vital policy interest in labor peace and avoiding 'free riders'." *Lehnert* v. *Ferris Faculty Assn.*, 500 U.S. 507, 111 S.Ct 1950, 1959, 114 L.Ed 2d 572 (1991). By contrast, as this Court stated in *Keller*, quoted above, the State's interest that justifies intruding upon the First Amendment interests of lawyers by compelling membership in an integrated bar is "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. 110 S.Ct. at 2236, 110 L. Ed. 2d 13 (1990.) In short, when State compulsion of association in a State agency is mandated, the First Amendment requires not merely that the State possess what it deems to be a salutary purpose, but also requires a specific compelling purpose and a narrow tailoring of the means employed to the minimum required to satisfy it.

FIRST REASON TO ALLOW THE WRIT

The Supreme Court of Florida has now passed on the questions left open in *Keller*. In *The Florida Bar Re Frankel*, 581 So.2d 1294, 1299, 1300 (Fla. 1991), that Court reviewed this Courts' decision in *Keller*, and reconfirmed the limits the State of Florida places on The Florida Bar's political activities, which it had previously prescribed in *Schwarz II*. Those limits restrain The Florida Bar's political activities to matters that satisfy one or more of these criteria:

(1) Questions concerning the regulation and discipline of attorneys;

(2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;

(3) increasing the availability of legal services to society;

(4) regulation of attorneys' client trust accounts; and

(5) the education, ethics, competence, integrity and regulations as a body, of the legal

profession

[6] [additional matters, if]

(1) That the issue be recognized as being of great public interest;

(2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) the subject matter affects the rights of those likely to come into contact with the judicial system.

Schwarz II, 552 So. 2d at 1095. To these criteria must be added the Supreme Court of Florida's decision in this case approving The Florida Bar's political agenda to change the constitution of the State in regard to how judges are selected and approving its activities to promote the retention elections of justices of the supreme court of Florida and judges of the district court of appeal. Neither of these matters falls within the permissible ambit set forth in *Keller*: i.e., "regulating the legal profession and improving the quality of legal service." Both are efforts

to persuade the legislature or the public to endorse the State's political agenda that Petitioners oppose. Consequently, as one reason for allowing the writ, Petitioners respectfully submit that the decision below has decided a federal question in a way that intrudes more heavily upon First Amendment freedoms then permitted by this Court's decision in *Keller*.

SECOND REASON TO ALLOW THE WRIT

In addition, The Florida Bar (i.e., the State) has explicitly held itself out as possessing the power to "represent" the "collective opinion" of the "State's lawyers." "Response of The Florida Bar," Case No. 84,615, In the Supreme Court of Florida. Appendix C, p.51a. The Supreme Court of Florida, which repeatedly asserts that The Florida Bar is its "creation" and "under our supervision and subject to our regulation," *The Florida Bar Re Schwarz*, 552 So. 2d 1094 (Fla. 1989); *The Florida Bar Re Frankel*, 581 So. 2d 1294, 1299 (Fla. 1991), must be

deemed to have endorsed this view. Thus, in Florida, The Florida Bar is more than a private labor union that takes positions for the organization as an organization. Instead, it is a state agency that holds itself out as the political representative not merely of itself as an organization but also of all of "the State's lawyers," even those who vehemently disagree.

As a second reason for the allowing the writ, Petitioners submit that the decision below explicitly raises the important question of compelled state association left unresolved by *Keller*. Petitioners respectfully assert that the sheer weight of the liberty interests at stake and the importance of an independent legal profession (meaning a collection of independently minded private lawyers and not some compelled membership association) in the protection of American freedoms cry out for this Court to grant this petition. As this Court well knows, courageous *independent* lawyers were at work securing the forerunners

of American constitutional liberties before the First Amendment existed. The rules applied by State of Florida not only condition each Florida lawyer's right to practice law upon compelled membership in The Florida Bar but also compel each member to supply financial support for the State's political agenda for items that go far afield from regulating the practice and improving the quality of legal services. The Florida Bar, under the supervision and control of the Supreme Court of Florida, also claims the right to "represent" the lawyers of the state in its political efforts. It is not a sufficient answer to this that the members remain free to express their individual opposition to the State's political agenda, as The Florida Bar may well suggest. The Florida Bar is controlled by and its agenda authorized by the Supreme Court of Florida. The compelled dissenting members must represent their clients before that court and other courts of the State. The risk of perceived coercion to conform

to the State's agenda is apparent, if not real. Moreover, supervised and controlled by the Supreme Court of Florida, The Florida Bar by its own admission busies itself in promoting the retention elections of justices and district court of appeal judges by widely disseminating favorable informational literature and proposed endorsements to local bar associations "if they should decide to endorse particular judicial candidates." "Response of The Florida Bar," Case No. 84,615, In the Supreme Court of Florida. Appendix C. p.56a. Again, the risk of perceived coercion is too real to justify.

Similarly, it is not a sufficient answer to First Amendment intrusions that the Florida Bar deems it motivation to be salutary and its agenda to be important. Daniel Webster warned of this saying, "Good intentions will always be pleaded for every assumption of authority; it is hardly too strong to say that the Constitution was made to guard people against the damages of good

intentions." Quoted, *Ex Parte Carter* v. *Forester*, 395 So.2d 65, 70 (Ala. 1980). The Florida Bar itself has admitted: "It is likely that many, if not most, issues significant enough to be addressed by the Bar will be subject to a difference opinion among members of the Bar and the public at large." "Response of the Florida Bar," Case No. 84,615, Supreme Court of Florida. Appendix C, p.52a. It is to provide an answer to what limits the First Amendment places upon The Florida Bar's authority to take political positions upon which compelled members disagree that this petition has been filed.

THIRD REASON FOR ALLOWING THE WRIT

As a third reason for allowing the writ, Petitioners also submit that the decision of Supreme Court of Florida sought to be reviewed is in conflict with *Schneider* v. *Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), certiorari denied 502 U.S. 1029, 112 S.Ct. 865, 116 L.Ed 2d 772 (1992), on the issue of what kinds of political

activities fall within the justifying purposes for compelling membership in an integrated bar, set out in *Keller,* and in conflict with *Carroll* v. *Blinken*, 957 F.2d 991 (2nd Cir. 1992) on the core issue as to whether the State can compel membership (as opposed to limited financial support for) in a state agency association that persists in engaging in activities that transcend the core purposes that justify some First Amendment compulsion.

Schneider examined a challenge to the integrated bar of the commonwealth of Puerto Rico, claiming illegal First Amendment compulsion not unlike in some respects the claims Petitioners make herein. *Schneider* approved a statement of core *Keller* purposes that is substantially more limited than the core purposes enunciated by the Supreme Court of Florida in *Schwarz II*, as follows:

> The district court therefore articulated its own list of "permissible purposes" for which financial support may be compelled. These purposes, which the court acknowledged may not be exhaustive, all revolve around

> the role of the lawyer as lawyer, rather than relying on the lawyer's more generic role as an informed and perhaps influential member of a complex society. The four areas are: monitoring attorney discipline, ensuring attorney competence, increasing the availability of legal services and improving court operations. Activities that promote one or more of these purposes, and which therefore may be funded by mandatory dues and fees, could include continuing legal education programs, legal aid services, public education of substantive areas of the law (e.g., landlord-tenant) that would help citizens recognize and enforce their legal rights, and public commentary on such matters as rules of evidence and attorney advertising.

917 F.2d at 626, 627; 917 F.2d at 631. The *Schneider* court's permissible examples constitute educational activities in a politically neutral sense; none of them involves the bar's engaging in activities designed to influence a legislature or the public mind to vote one way or the other on disputed political issues. *Schnieder* also stated particular activities that it deemed to be beyond the *Keller* pale, as follows:

Among the activities that could *not* properly be funded with mandatory dues would be lobbying on controversial bills to change the law in ways not directly linked to legal profession or the judicial system. For example, the bar could not us dissenting members' funds to promote a system of no-fault automobile insurance, endorse an pro-life amendment to the Commonwealth constitution or generate support for a death penalty.

Among the Colegio's activities that clearly fall outside the narrow categories for which financial support may be compelled are the following Colegio-sponsored committees: the Committee for the Study of the Constitutional Development of Puerto Rico from 1977 to 1984, which, among other business, has published a report on the "Procedural Requirements for Decolonization of the United Nations Organization", the Electoral Process Committee, which was created "to enhance the level of political debate in our country, to enforce compliance with the laws governing the voting process and to frame a code of ethics to regulate public debate among political candidates"; the Special Committee on Nuclear Armament and the Nuclear Arms Ban Treaty in Latin America, and the Committee for the Study of the Proposed Territorial Demarcation of the San Juan and Rio Piedras Delegations.

917 F.2d at 633. Some of these activities that *Schneider* deems to "clearly fall outside" the *Keller* limits are exactly the kinds of activities that the Supreme Court of Florida approved. This conflict justifies this Court's resolution.

In *Carroll* v. *Blinken*, 957 F.2d 991 (2nd Cir. 1992), the State of New York had compelled students in the state university system to pay a fee to and become a member of a public interest student group (NYPIRG), which promoted a political and ideological agenda which compelled members opposed. 957 F.2d at 993, 995. *Carroll* analyzed the issues under the *Keller* standards and concluded "that these three interests - the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate - together are substantial enough to justify the infringement of appellants' First Amendment right against compelled speech which occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG." 957 F.2d at 1001.

Nevertheless, as to *compelled membership Carroll* held that the State had overstepped First Amendment bounds:

> The interests that legitimize SUNY Albany's distribution of students money to NYPIRG and a host of other organizations do not come close to being sufficiently substantial to justify NYPIRG's automatic membership policy. Once the activity fee has been used to set in place a campus where extracurricular options abound and ideological and other debate is vigorous, students need not be further linked against their will or knowledge with any student organization. Far from fulfilling SUNY Albany's interest in promoting campus pluralism and free choice among several avenues of informal learning, allowing one group to make members of all students gives it an unearned advantage in the campus competition for hearts and minds. More important, it puts the lie to appellees' argument that students are not linked in the popular mind with NYPIRG aims. NYPIRG expressly forges such a link when it proclaims that its "membership" includes all fee paying SUNY Albany students. By overtly and inaccurately claiming to represent the interests of the SUNY Albany student body, NYPIRG has irredeemably transgressed the proscription against forced association.

957 F.2d at 1003 (Underlining supplied.) Similarly, the State's compulsion of Petitioners' membership in The Florida Bar and The Florida Bar's overt proclamation that it represents the lawyers in the state "puts the lie" to any claim that Petitioners are not "linked in the popular mind" with The Florida Bar's political agenda, which they oppose. Accordingly, the decision below is in conflict with *Carroll* on a vital First Amendment issue that justifies the allowance of the writ.

Florida is now the fourth most populous state in the nation and has been a bell-weather for many legal innovations, including matters pertaining to the legal profession. What the state of Florida permits those in authority to do will plainly be emulated by others. Although old hat to this court, Lord Acton's famous aphorism applies full force: "Power tends to corrupts and absolute power corrupts absolutely." As noted in the opening passages of this petition, the constitution of the

State of Florida reposes exclusive jurisdiction in the Supreme Court of Florida to decide who practices law in Florida and to regulate under what requirements and conditions. Furthermore, the members of that court are not subject to contested democratic elections in which the people choose among the competing ideas of opposing candidates. Instead, the justices are appointed and must merely withstand uncontested retention elections, which the court's creation, The Florida Bar, undertakes to promote. There is no accountability in democratically contested elections.

In short, the State of Florida has overstepped its bounds in this case and the reason it has overstepped is that the State itself has placed no prudential limits on its power to impose unconstitutional conditions upon those who seek to practice law as a livelihood. As Thomas Jefferson said, "In questions of power, then, let no more be said of confidence in man, but bind him down from

mischief by the chains of the Constitution." Kentucky Resolutions, November 1778. Petitioners respectfully submit that this case pointedly raises the critical First Amendment questions that in *Keller* this Court left to a later day. This is the later day. Petitioners respectfully submit that this Court should issue the writ and decide this critical question of whether the chains of the First Amendment place limits on the power of the State to compel association in a state agency whose political agenda and activities are abhorred by the members and which are beyond the *Keller* limits.

Conclusion

For reasons stated herein and summarized below, Petitioners respectfully submit that this Court should allow the writ to consider the important First Amendment issues left open by *Keller:*

1. The decision below has decided a federal question in a way that intrudes more heavily upon

Petitioners' First Amendment rights than authorized by this Court in *Keller*.

2. This decision plainly raises the vital question left open in *Keller* as to what limit the First Amendment places upon state compelled membership in a state agency association with a political agenda opposed by Petitioners.

3. This decision conflicts with *Schneider* as to what specific political and ideological activities and agenda *Keller* permits and conflicts with *Carroll* on the question of whether the State may compel membership in an association whose political agenda Petitioners oppose.

Respectfully submitted,

4/26/95

Joseph W. Little
Attorney for Petitioners
3731 N.W. 13th Place
Gainesville FL 32605
904-392-2211

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APPENDIX A

SUPREME COURT OF FLORIDA

MONDAY, JANUARY 30, 1995

THE FLORIDA BAR, *

*

RE: HARVEY M. ALPER, ET AL. *
CASE NO. 84,615

*

* * * * * * * * * * * * * * * * * *

Petition to Enjoin The Florida Bar from Engaging in Unauthorized Activities that Violate Petitioner's Rights under the First and Fourteen Amendments to the United States Constitution filed by Petitioners, Harvey M. Alper, Joseph W. Little and Henry P. Trawick, is hereby denied.

GRIMES, C.J., OVERTON, SHAW, KOGAN, HARDING, WELLS AND ANSTEAD JJ., CONCUR

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APPENDIX B

(Including exhibits 2, 3, 4, 5, 6, and 12 in original)

IN THE SUPREME COURT OF FLORIDA

HARVEY M. ALPER, JOSEPH W. LITTLE, and HENRY P. TRAWICK,
Petitioners

CASE NO._____

vs.

THE FLORIDA BAR,
Respondent

PETITION TO ENJOIN THE FLORIDA BAR FROM ENGAGING IN UNAUTHORIZED ACTIVITIES THAT VIOLATE PETITIONERS' RIGHTS UNDER THE FIRST AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioners, Harvey M. Alper, Joseph W. Little and Henry P. Trawick, show:

1. Petitioners are active members in good standing of The Florida Bar.

2. Petitioners invoke the jurisdiction of this Court pursuant to Article V section 15 Florida Constitution and this Court's holding in The Florida Bar re Schwarz, 552 So2d 1094 (Fla.1989) (hereinafter referred to as Schwarz): to wit, "any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court."

3. Petitioners seek a declaration that a current legislative position and current political activities of The Florida Bar authorized, approved and supported by the Board of Governors are both outside the limits permitted them by this Court's holdings in Schwarz and In re

Frankel, 581 So.2d 1294 (Fla. 1991) and also violate their rights guaranteed by the First and Fourteenth Amendments to the United States Constitution under the holding of the United States Supreme Court in Keller v. State Bar of California, 496 U.S. 1, 110 S. Ct. 2228 (1990).

4. Petitioners submit that the legislative position of The Florida Bar advocating a proposal to amend Article V of the Florida Constitution to eliminate the popular election of trial judges is beyond its powers and violative of the constitutional rights referred to above.

5. The Florida Bar is also involved in political activities that directly and indirectly undertake to support the reelection of justices and judges of the district courts of appeal who appear on merit retention election ballots. The Florida Bar, acting under policies and practices approved and acquiesced in by the Board of Governors, does this by distributing favorable information about the

merit retention reelection candidates to the public media and otherwise, and by using the resources of The Florida Bar to encourage local bar associations and others to support the merit retention elections.

6. In support of their application, Petitioners submit: (a) In Schwarz this Court laid down the following criteria to limit the Bar's legislative and lobbying activities:

> 1. Questions concerning the regulation and discipline of attorneys;
>
> 2. Matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
>
> 3. Increasing the availability of legal services to society;
>
> 4. Regulation of attorneys' client trust accounts; and
>
> 5. The education, ethics, competence, integrity and regulation as a body, of the legal profession; and,
>
> (b) Provided for exceptional cases limited by these additional criteria:

1. That the issue be recognized as being of great public interest;

2. That lawyers are especially suited by their training and experience to evaluate and explain the issue; and

3. The subject matter affects the rights of those likely to come into contact with the judicial system.

7. In addition to the foregoing standards The Florida Bar must adhere to the standards required by the First and Fourteenth Amendments to the United States Constitution as applied by the United States Supreme Court in Keller, where the Court said:

> ...the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such a manner fund activities of an ideological nature which fall outside of those areas of activity. .....
>
> Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional

> advisors to those ultimately charged with the regulation of the legal profession , on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.

496 U. S. 1, 110 S.Ct. at 2236, 2237. (Underlining supplied.)

8. Petitioners submit that the method of selection of judges is purely a political matter and is not connected with any proper field of regulation by this Court or activity of The Florida Bar. Various means of selecting judges have since the 1838 Constitution was adopted. Justices of this Court were elected by the people throughout much of the history of the State. No one has ever shown, nor

could show, that the justices who were elected by the people supplied any less just decisions, or possessed any less valid public policy precepts, or used their regulatory powers less effectively and appropriately in service to the public and the law than the justices who were not so elected in the last few years. Circuit court judges have been elected in this State since 1942 and were elected in other times in the past. No one has ever shown, nor could show, that the judges elected by the people were less well prepared, less able, less committed to the fair and just administration of justice, less industrious, less prudent and temperate in their personal lives and less effective judges than those judges who might not be elected by the people.

9. These are plainly political and ideological matters. Members of the Bar will be deeply and hotly divided on the question. Lawyers have no claim to a

superior position than lay people on this issue. The reason is simple: the selection of judges is a quintessential political issue. It always has been and always will be. Under the constitutions of the United States of America and Florida, it is a decision to be made by the people themselves and not by some self-appointed experts.

10. Political support, or lack of it, for the merit retention reelections of incumbent justices and judges of the district court of appeals is even more plainly a political matter.

11. The Florida Bar has prepared and distributed throughout the State various materials in connection with its political support of justices and judges in merit retention elections using the facilities, personnel and funds of The Florida Bar derived from dues paid by compelled members, such as Petitioners, including the following items attached hereto as exhibits:

(1) Exhibit 1-1 Justices of the Florida Supreme Court;

Exhibit 1-2 Judges of the First District Court of Appeal;

Exhibit 1-3 Judges of the Second District Court of Appeal;

Exhibit 1-4 Judges of the Third District Court of Appeal;

Exhibit 1-5 Judges of the Fourth District Court of Appeal;

Exhibit 1-6 Judges of the Fifth District Court of Appeal.

(2) Exhibit 2 Memorandum, September 30, 1994.

(3) Exhibit 3 Model Bar Association Resolution Endorsing Judicial Candidates.

(4) Exhibit 4 Model Bar Leader Letter to Area Media.

(5) Exhibit 5 Model Bar Leader Oral Presentation to Area Media.

(6) Exhibit 6 Report Form, Judicial Merit Retention, Public - Information -- Educational Activities.

(7) Exhibit 7 1994 Public Education Campaign Judicial Merit Retention.

(8) Exhibit 8 Code of Judicial Conduct.

(9) Exhibit 9 Article V Judiciary, Constitution of the State of Florida.

(10) Exhibit 10 Chapter 105, Nonpartisan Election for Judicial Officers.

(11) Exhibit 11 Merit Selection and Retention July 1994.

(12) Exhibit 12 News Release, September 26, 1994, Florida Lawyers Overwhelmingly Support Retention of State Supreme Court Justices and Appeals Judges.

(13) Exhibit 13 The Florida Bar Merit Retention.

12. The Florida Bar produced and distributed the exhibits referred to in the preceding paragraph to promote its political agenda of supporting the retention elections of the justices and judges.

13. Petitioners do not support these political agenda and these activities of The Florida Bar.

14. As long as Florida Bar engages in these activities, requiring Petitioners to be members of The Florida Bar as a condition upon their right to practice law in this State violates their core political rights guaranteed

by the First and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For all the foregoing reasons, Petitioners seek an order from this Court to The Florida Bar clarifying that it has no authority or power to employ any funds, personnel, property, symbols or other evidences of Bar involvement in promoting or advocating any change in the means by which judges are selected in Florida, and seek an order to The Florida Bar clarifying that it has no authority or power to employ any funds, personnel, property, symbols or other evidences of Bar involvement in promoting or publicizing the merit retention elections of incumbent justices and judges.

Respectively submitted,

Joseph W. Little
Submitted on behalf of
Petitioners Alper, Little and
Trawick.
Florida Bar No. 196749
3731 N. W. 13th Place
Gainesville, Fl. 32601

CERTIFICATE OF SERVICE

I certify that a copy of this petition was mailed to Bill Blews, President, The Florida Bar, and John Harkness, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Fl. 32399-2300 on the 27th day of October, 1994.

Joseph W. Little

APPENDIX B - EXHIBIT 2

THE FLORIDA BAR
650 Apalachee Parkway
Tallahassee, FL 32399-2300/904-561-5600

John F. Harkness, Jr.
Executive Director

September 30, 1994

MEMORANDUM

To: Voluntary Bar Presidents and Executives

From: Judicial Merit Retention Elections

On behalf of The Florida Bar and members of our state judiciary, we would like to ask your help again in promoting greater public understanding of Florida's judicial merit retention elections process.

In the November 8 general election, our chief Justice and one fellow justice of our Supreme Court plus 20 District Court of Appeal judges will be before the voters in Florida's ninth statewide merit retention campaign. This

concept was incorporated into our state constitution in 1976.

The Florida Bar has prepared a statewide effort to inform and educate the electorate - - through the news media, appearances before civic groups, and other public contacts -- on what merit retention is, how it differs from other elections processes, who the incumbent judicial candidates are, and the criteria a voter should utilize in deciding whether to retain an appellate judge on the bench.

These educational efforts have been helpful. However, much is left to be done to ensure that our merit retention process is fully understood. Therefore, we hope members of your association can take the necessary time between now and November 8 to help with this public education effort.

Contact with your area media -- newspapers, magazines, radio and television will be critical. Access to opinion

leaders and civic groups, which your individual association members can provide, should also be utilized. To assist with such localized efforts, an updated package of materials used in our past media relations programs is enclosed. These items include extracts from the Florida Constitution, Code of Judicial Conduct and Florida Statutes applicable to merit retention elections, along with the Bar's 1994 merit retention poll results.

Also provided are suggested letters for you to use in initiating media contacts in your area, a model script for any other presentation you might consider, and a model resolution should your bar association opt for formal support of these individual judges. Additionally, sample brochures containing biographies of judicial candidates in your area have been enclosed. Bar staff should be able to provide any other information you might desire.

We encourage you to select a leading member of your

association who can direct this effort in your community. Also, to assist in our plans, please provide us with an estimate of the number of judicial biographical pamphlets your association will need for its activities. A form for requesting these materials, along with a reply envelope, is enclosed.

We thank you in advance for your willingness to assist in promoting greater public understanding of the merit retention process in Florida. If additional information or assistance is needed, please contact Charlotte Bragdon at The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, (904)561-5600.

Very truly yours,

President
William F. Blews
The Florida Bar

Chair
Jack Helinger
Voluntary Bar Association
Liaison Committee

WFB/JH:kcT23
Enclosures

APPENDIX B Exhibit 3

MODEL BAR ASSOCIATION RESOLUTION

ENDORSING JUDICIAL CANDIDATES

WHEREAS, the voters of this State will decide on November ____ 19 , whether certain justices of the Supreme Court of Florida and certain judges of the Florida District Courts of Appeal should be retained in office, and

WHEREAS, attorneys have a special responsibility and ethical duty to assist in maintaining the quality of the legal system and assuring the competence of those administering it, and

WHEREAS, the members of the [bar association name] may be better situated than other members of the public to evaluate the performance of members of the judiciary, and

WHEREAS, the Honorable [Supreme Court

candidates] of the Florida Supreme Court and the Honorable [Area DCA candidates] of the _____ District Court of Appeal are on the ballot on November _____, 19 , for a merit retention vote by the citizens of Florida, and

WHEREAS, these Supreme Court justices and District Court of Appeal judges have served their courts and the legal system with integrity, dignity, impartiality, and wisdom, and

WHEREAS, their personal and professional deportment have been such that public confidence and respect for the legal system have been greatly enhanced, and

WHEREAS, the [bar association name] has particular interest in and knowledge about the quality and performance of the justices of the Florida Supreme Court and the judges of the _____ District Court of Appeal,

and

WHEREAS, the performance and conduct of these individuals while serving on the Florida Supreme Court and the _____ District Court of Appeal have amply merited their retention in office,

NOW, THEREFORE, BE IT RESOLVED by the [bar association name] that the Honorable [Supreme Court candidates] of the Supreme Court of Florida and the Honorable [Area DCA candidates] be commended for their esteemed and distinctive service on the Bench and that they be endorsed and supported for retention in office for an additional six-year term.

BE IT FURTHER RESOLVED that certified copies of this resolution be furnished to the news media so that the electorate may know of this Association's endorsement of these particular judges' retention in office.

APPENDIX B EXHIBIT 4

MODEL BAR LEADER LETTER TO AREA MEDIA

[Inside Address]

Re: Judicial Merit Retention Elections

[Salutation]

[Appropriate Introductory Paragraph]

As you know, our chief justice and three fellow justices of the Florida Supreme Court, plus 19 judges from Florida's various district courts of appeal, will appear as nonpartisan entries on the November 3 general election ballot for a "Yes" or "No" vote as to whether they should be retained on the bench for another six-year term.

In our community, the merit retention ballot will include Chief Justice Rosemary Barkett, and Justices Major B. Harding, Parker Lee McDonald and Ben F. Overton of the Supreme Court of Florida, who will be subject to a

statewide vote. Additionally, [judges' names] from our own [district number] District Court of Appeal will be on our local ballot, and those of other nearby communities within the regional jurisdiction of that district court.

This "merit retention" process of reconfirming Florida's appellate-level judges became a part of our state Constitution in 1976. This year's election is our state's eighth experience with this procedure whereby an incumbent appellate judge runs unopposed for retention in office but is subject to voter review of his or her past judicial performance.

While many Floridians are becoming familiar with this somewhat unique voting process, some citizens may not fully appreciate its significance. Our bar association -- in cooperation with The Florida Bar and the League of Women Voters of Florida -- would like to ensure that every Floridian casts an informed vote which reflects an

understanding of the merit retention concept.

Our association thinks it is vital that the public be informed about merit retention, how it differs from other election processes, who the judicial incumbents are on a statewide basis and in this appellate district, and on what basis the voters should make their decision to retain an appellate judge in office for another six years.

Enclosed is a copy of the results of the Bar's 1992 merit retention preference poll for appellate judges and its accompanying press release. Finally, I am including pamphlets containing biographical information about those Supreme Court justices and District Court of Appeal judges who will appear on our November ballot.

Merit retention is an important component of the Florida elections process, requiring continual public education as to its uniqueness and importance. Our association encourages your coverage of this topic and its impact on

our upcoming judicial elections. Should you consider endorsing any of these judicial candidates, I feel certain they would be happy to meet with you for interviews. In any event, we hope you will assist in educating our citizens about this important voting process. If I or any member of the [bar association name] Bar Association can be of further help in these efforts, please let me know. Thank you for your assistance in this worthwhile public service.

Sincerely,

[Signature and Title]

cc: [Supreme Court and Area DCA Candidates -- names and addresses attached]
cc: Ms. Charlotte Bragdon
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

Enclosures: (a) 1992 Merit Retention Preference Poll results
(b) Supreme Court and DCA biographical pamphlets

APPENDIX B EXHIBIT 5

MODEL BAR LEADER ORAL PRESENTATION TO AREA MEDIA

[Appropriate Introductory Statement]

[I/We] would like to thank our local news media representatives for attending this meeting. The purpose of this presentation is to help in any way [I/we] can to explain and answer questions about Florida's merit retention voting process. [I/We]as (an) official(s) of The Florida Bar and [bar association name] [is/are]extremely interested in making certain that the public is informed as much as possible about this subject and how it affects members of our state's appellate judiciary.

Merit retention is a unique voting process that offers regular citizen review of our state's higher level judges, intended to keep quality individuals on Florida's Supreme

Court and five district courts of appeal. The public is asked to vote "Yes" or "No" for each justice or judge who is on the General Election ballot for retention. There are no other candidates opposing these judges; individual judges from the same court are not running against one another. If the majority of those voting cast a "Yes" vote, then an incumbent judge is retained for another six-year term. If the majority votes "No" for any incumbent, then that judge must step down from office and the Governor of Florida appoints a successor from a group of three candidates recommended by a judicial nominating commission.

This election procedure is still relatively new to our state. It began in 1976 when the voters of Florida amended their constitution to provide for merit retention for all appeals court judges. It will be the eighth time that most Florida

voters have participated in this type of election. Because of voters' somewhat limited experience with merit retention, as well as Florida's ever-growing population, our bar association is concerned that many citizens may not fully understand this procedure.

In this year's election, the chief justice and three other members of the Supreme Court of Florida are scheduled for a merit retention vote. The names of the Supreme Court justices up for retention will appear on the statewide ballot because the court's jurisdiction extends throughout Florida.

[Note Supreme Court candidate by name and summarize appropriate biographical data.]

Additionally, on November 3, a total of 19 other appellate judges from Florida's various district courts of appeal will face the voters. Under our merit retention system, DCA Judges appear on the ballot only in the area, or district,

where their court has jurisdiction.

[Appropriate city/county/area] is part of the [district number] appellate district. [Number of area candidates] Judges from the [district number] District Court of Appeal will be on our area ballot for a merit retention vote.

[Note area DCA candidates by name and summarize appropriate biographical data.]

These are the Supreme Court and district court of appeal Judges who will appear in the nonpartisan section of our local General Election ballot, without opposition, for a "Yes" or a "No" vote as to their retention in office.

In a recent statewide poll of lawyers conducted by The Florida Bar, all these appellate judges -- to include those without our [district number] appellate district -- received votes of confidence by those participating in the poll.

APPENDIX B EXHIBIT 6

THE FLORIDA BAR
650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300

904/361/8600
FAX: 904/222/3729

JOHN F. HARKNESS, JR.
Executive Director

REPORT FORM
JUDICIAL MERIT RETENTION
PUBLIC INFORMATION--EDUCATION ACTIVITIES

Re: Local Bar Association Public Information--Education Effort Concerning Judicial Merit Retention Election (November 8, 1994)

Please be advised that the following activities are being or have been undertaken with the objective of informing and educating the public in our community concerning the merit retention system for appellate judges, the particular judicial incumbents standing for retention on November 8, and the basis upon which voters should make their decisions as to the retention of these candidates (use additional pages, if necessary, and attach):

(Your Name and Office Held in Bar Association)

(Name of Voluntary Bar Association)

(Address)

Please send to: Mrs. Charlotte Bragdon
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

APPENDIX B EXHIBIT 12

NEWS RELEASE

FOR IMMEDIATE RELEASE

September 26, 1994
CONTACT: Jerry Butterfield
The Florida Bar
Tel. 904/561/5834

FLORIDA LAWYERS OVERWHELMINGLY SUPPORT RETENTION OF STATE SUPREME COURT JUSTICES AND APPEALS JUDGES

TALLAHASSEE, Sept. 26--Chief Justice Stephen H. Grimes and Justice Gerald Kogan of the Florida Supreme Court and the 20 other state appeals court judges up for merit retention election on the November 8 ballot have received overwhelming endorsement- for continuation in office by Florida lawyers.

The results of

the Florida Bar's merit retention judicial poll were announced today by Florida Bar President William F. Blews of St. Petersburg.

The results of the merit retention poll for the Supreme Court of Florida show 89 percent of the lawyers who expressed an opinion regarding retention of the justices recommend retention of Chief Justice Stephen H. Grimes and Justice Gerald Kogan.

The results of the merit retention poll of lawyers for the First District Court of Appeal show: 88 percent recommend retention of Richard W. Ervin, III; 93 percent recommend retention of James E. Joanos; 87 percent recommend retention of Leroy Arthur Lawrence, Jr.; 86 percent recommend retention of Stephan Pierre Mickle; and 87 percent recommend retention of Peter D. Webster.

The results of the merit retention poll of lawyers for the Second District Court of Appeal show: 88 percent

recommend retention of John R. Blue; 89 percent recommend retention of Monterey Campbell, III; 91 percent recommend retention of Jack R. Schoonover; and 91 percent recommend retention of Edward F. Threadgill, Jr.

The results of the merit retention poll of lawyers for the Third District Court of Appeal show: 85 percent recommend retention of Natalie Baskin; 94 percent recommend retention of Phillip Arthur Hubbart; and 86 percent recommend retention of James R. Jorgenson.

The results of the merit retention poll of lawyers for the Fourth District Court of Appeal show: 93 percent recommend retention of John William Dell; 85 percent recommend retention of Bobby Carol W. Gunther; 92 percent recommend retention of Larry Alan Klein; 87 percent recommend retention of Barbara J. Pariente; and 90 percent recommend retention of Barry Joel Stone.

(Harry Lee Anstead's name appeared on the judicial poll ballot; however, his name will not be on the General Election ballot for merit retention since he was appointed to the Supreme Court of Florida in the interim. It may be noteworthy that he received a 95 percent approval rating, the highest in the state.)

The results of the merit retention poll of lawyers for the Fifth District Court of Appeal show: 71 percent recommend the retention of James C. Dauksch, Jr.; and 90 percent recommend the retention of Emerson R. Thompson, Jr.

In the secret ballot distributed to all lawyers in Florida August 1, lawyers were asked to indicate whether the incumbent judges "should be retained" or "should not be retained" in office for another slx-year term under the merit retention system. Only lawyers who indicated at least limited knowledge of the judges' qualifications were

included in the poll results. Some 6,219 lawyers participated in the statewide poll.

In announcing the poll results , Florida Bar President Blews explained that "Lawyers are familiar with the justices and judges and the work they do. Since the general public has so little contact with appellate judges, the poll of lawyers provides information intended to help citizens make an informed choice in the voting booth."

In the Bar poll, lawyers were asked to consider eight attributes of the justices and judges they were voting on, including: quality and clarity of judicial opinions; knowledge of the law; integrity; judicial temperament; impartiality; freedom from bias/prejudice;demeanor; and courtesy.

The Florida Bar has published results of its polls as a public service since the first merit retention election in 1978. In merit retention elections the judges run

unopposed-- voters cast their ballot to "retain" or "not retain" the judge in office: If the judge is not retained, the office will be filled through the merit selection system of one of three nominees of a Judicial Nominating Commission being appointed by the governor.

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Tallahassee, FL 32399-2300

EDITORS: Please note "Association is not a part of our name. Proper reference is simply "The Florida Bar." Local bar organizations properly termed "associations."

APPENDIX C

SUPREME COURT OF FLORIDA

THE FLORIDA BAR

RE: HARVEY M. ALPER, ET AL. Case No. 84,615

_____/

RESPONSE OF THE FLORIDA BAR

Petitioners challenge two actions of The Florida Bar: adoption of a legislative position advocating amendment of Article V of the Florida Constitution to establish merit retention for trial judges; and distribution of informational material relating to judges facing merit retention election. Petitioners allege that both acts violated their rights under the First and Fourteenth Amendments to the United State Constitution, and exceed the limits of permissible Bar activity as set out in *The Florida Bar re Schwarz,* 552 So.2d 1094 (Fla. 1989) and *The Florida Bar re Frankel*, 581 So.2d 1294 (Fla. 1991).

Neither of the challenged activities involve current

programs of the Bar. Standing Board Policy 9.20(d) provides that a legislative position adopted by the Board remains in effect for the biennial legislative session following its adoption, unless reversed or rescinded. The merit retention position last adopted by the Board lapsed in July, 1994 and has not been readopted since. The merit retention pamphlets which Petitioners complain of were last distributed prior to the November, 1994 election and no decision has been made by the Board with respect to future distribution of similar pamphlets. Nevertheless, the Bar recognizes that this proceeding falls within the Court's administrative authority and there is no necessity for an existing case or controversy. Consequently, the Bar will address the merits of the issues raised.

I

The challenged activities do not violate the Petitioners' rights under the First and Fourteenth Amendments to the United States Constitution.

The federal constitutional requirements applicable to State bar activities were announced in *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, I l0 L.Ed.2d 1 (1990). The case imposed no prohibition upon State bar legislative or other political activities. *Keller* simply addressed the use of compulsory bar dues for political and ideological activities. The Court held that, where such activities were germane to the Bar's purpose of "regulating the legal profession or improving the quality of the legal service available to the people of the State," the bar was not only constitutionally free to engage in the activities, but was permitted by federal constitutional law to use compulsory dues to fund the activities. *Keller*, at U.S. 14. Even when the activities were not germane, the remedy required by *Keller* was not prohibition of the activity, but prohibition of the use of an objecting member's dues. The decision rested upon the Court's earlier analysis of the

constitutional implications of using compulsory union dues for political and ideological purposes in *Abood v. Detroit Board of Education*, 431 U.S. 209,97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). The Court concluded in *Keller* that an integrated bar which engaged in political or ideological activities "could certainly meet its *Abood* obligation by adopting the sort of procedures described in Hudson." *Chicago Teachers' Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232(1986)]. Id. at U.S. 17. The *Hudson* procedures require that bar members be given an adequate explanation of the basis for their dues, a reasonably prompt opportunity to challenge the amount of the dues used for such advocacy before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending. The Florida Bar has adopted rules designed to meet the *Hudson*

procedures.[1] Those rules were expressly approved in *Gibson v. The Florida Bar*, 906 F.2d 624 (11th Cir. 1990).[2]

In *Frankel*, this Court found that its earlier analysis in Schwarz was consistent with the United States Supreme Court's holding in Keller, and reaffirmed the restrictions imposed upon political and ideological activities by The Florida Bar in *Schwarz*. Those restrictions go beyond the requirements of *Keller* and prohibit the Bar from engaging in any activities which are not germane to its purpose of improving the administration of justice or advancing the science of jurisprudence regardless of how those activities are funded. Thus, the only issue to be decided in this proceeding is whether the challenged

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[1] Rules Regulating The Florida Bar, 2-9.3.

[2] The United States Supreme Court initially granted certiorari to review the rules, -- U.S. - 111 S.Ct. 1305, 113 L.Ed.2d 240 (1991), but dismissed the case after oral argument -- U.S. --,112 S. Ct. 633, 116 L.Ed.2d 432 (1991).

activities are within the permissible scope of Bar action as defined in *Schwarz* and *Frankel*.

II

The challenged activities meet the criteria established in *The Florida Bar re Schwarz*, and *The Florida Bar re Frankel*.

The essential flaw in Petitioners' argument is its assumption that anything which is "political" is beyond the reach of permissible Bar activity. The term "political" establishes no meaningful standard at all. *Webster's Third New International Dictionary* (1993) defines "political" as:

> of or relating to government, a government, or the conduct of governmental affairs

Any effort to influence legislation or otherwise effect a change in statutory or constitutional law is, by definition, political. Nevertheless, the Bar is expressly authorized to provide information and advice to all branches of

government "concerning current law and proposed or contemplated changes in the law." Rules Regulating The Florida Bar, 2-3.2(d)(4). The suggestion that the Bar should be prohibited from engaging in political activities has been made before and rejected by this Court. The range of the Bar's authority to engage in political and ideological activity was established by this Court in a series of four cases, beginning with *In re: Florida Bar Board of Governors' Action*, 217 So.2d 323 (Fla. 1969). In that case, the Court said:

> The test as to whether or not The Florida Bar should engage in a particular activity is not whether the activity is "political" in nature or directly connected with the administration of justice. The true test is whether the matter is of great public importance, and whether lawyers, because of their training and experience, are especially fitted to evaluate the same. If a matter vitally affects the public and lawyers are peculiarly fitted to evaluate it, it is not only the right but the duty of the Bar as a professional organization to make such evaluation and advise the public of its conclusion.

Id. at 324-325.

The Court again addressed the issue of "political" activity by the Bar when it decided *In re: Amendment to Integration Rule of The Florida Bar*, 439 So.2d 213 (Fla. 1983). The petitioners were seeking to have the Integration Rule amended to provide:

> The Board or Governor shall not engage in any political activity on behalf of The Florida Bar nor expend money or employ personnel for such purpose.

The Court referred to the standard set by the United States Supreme Court in *Abood v. Detroit Board of Education*, supra, and found that the State has a compelling interest in the improvement of the administration of justice and the advancement of the science and jurisprudence. The Court held that the Bar was authorized to engage in political activities that were germane to that interest. The Court reviewed a series of politically related activities that the Bar had engaged in

over a 13 year period, one of which was support for an amendment to the Florida Constitution providing for merit retention of appellate judges. The Court concluded that each of the activities, including the support for merit retention, was "germane to the improvement of the administration of justice and to the advancement of the science of jurisprudence." Id. at 214.

The decision in *The Florida Bar re Schwarz*, supra, did not overturn the earlier decisions in *In the matter of The Florida Bar Board of Governors' Action* and *In re Amendment to Integration Rule of The Florida Bar*. To the contrary, the *Schwarz* opinion favorably cited and built upon those prior opinions. The primary effect of *Schwarz* was to flush out the earlier opinions by defining five specific areas that were germane:

> (1) Questions concerning the regulation and discipline of attorneys;
>
> (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and

efficiency;

(3)increasing the availability of legal services to society;

(4)regulation of attorneys' client trust accounts; and

(5)the education, ethics, competence, integrity and regulation as a body, of the legal profession.

In addition, the Court set out three guidelines for determining whether any other subject areas were or were not germane:

(I)That the issue be recognized as being of great public Interest;

(2)that lawyers are especially suited by their training and experience to evaluate and explain the issues; and

(3) the subject matter affects the rights of those likely to come into contact with the judicial system.

Id. at 1095.

Nothing in the Court's subsequent opinions justifies a change in its earlier finding that the issue of merit retention of judges is germane to the improvement of the

administration of justice and the advancement of the science of jurisprudence. The issue falls within both the defined list of germane subject matters and the secondary guidelines. Whether or not one believes that merit retention actually results in improvement, it nevertheless is a matter *relating* to the improvement of the functioning of the courts, judicial efficacy and efficiency. Even if it were not, it would fall into the secondary guidelines. The manner of selecting judges is an issue of great public importance and obviously affects the rights of those likely to come into contact with the judicial system. It cannot seriously be denied that lawyers are especially suited by their training and experience to evaluate the issue of judicial selection. Lawyers are in a better position than non-lawyers to observe the impact of electing judges upon the system and to evaluate the relative benefits and shortcomings of an elective or appointive judiciary. The fact that the selection of judges is a "quintessential

political issue" doesn't reduce the special value of lawyers' opinions regarding the method of selection.[3]

Petitioners' primary argument with respect to the merit retention issue is that it cannot be proved that judges who have been elected are any less objective, judicious, or effective than judges who have been appointed. Initially, it should be noted that the issue of elective versus appointive judges involves more than the quality of the judges. It also raises questions relating to the impact upon the justice system of the necessity of a judge conducting an election campaign and the necessity of raising funds, most of which necessarily come from lawyers. In any case, the question is not what can or cannot be "proved." The criteria established in *Schwarz* and *Frankel* for political and ideological activity by the Bar

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[3] The President of the United States has traditionally sought the advice of the American Bar Association, not the American Medical Association, prior to making appointments to the Supreme Court.

did not include the ability to empirically prove the correctness or desirability of its position. The criterion relevant to the current discussion was that lawyers be "especially suited by their training and experience to evaluate and explain the issues." As to the manner of selecting judges, lawyers are especially suited to evaluate and explain the issue because they better understand the functions, qualifications and demands of being a judge, and because they spend their professional lives observing the results alternative forms of selection. Consequently, lawyers are in a better position than non-lawyers to develop an informed opinion, regarding the issue. The point is not whether lawyers can prove that the opinions they reach are the correct ones, but whether the collective opinion organization which represents the State's lawyers would be of special value to the Legislature or the public in reaching their decisions.

The Court determined that lawyers were presumed to

be especially suited to speak to matters included in the first five subject areas listed in *Schwarz*. Obviously, the Court was not anticipating that the Bar would always be able to "prove" the correctness of its position on such matters. The decision undoubtedly rested on the fact that lawyers are in a better position to observe and gain experience with those matters. The same is true of the judicial selection process.

The Petitioners' argument confuses the objective question of whether or not the issue is germane to the administration of justice with the subjective question of the desirability of a proposed change. This Court has assumed the role of passing upon the objective question of germanity, and has declined to become involved in the subjective question. It is likely that many, if not most, issues significant enough to be addressed by the Bar will be subject to a difference of opinion among members of the Bar and the public at large. Presumably, when the

Court invited lawyers to petition for a determination of whether or not a legislative position of the Bar is germane, it was not offering to become involved in the micro-management of the Bar's legislative program. In its opinion in *In re Florida Bar Board of Governors' Action, supra, the Court* expressly declined to become so involved:

> If the matter on which the Board of Governors speaks meets the tests heretofore set out, this Court should not second guess the position taken by the Board of Governors because to do so would substitute this Court's beliefs for that of the Board's. While there is no guarantee that this Court's views represent the views of the lawyers of this state, because the Board of Governors is the duly elected spokesman of the lawyer members of The Florida Bar, its view is at least representative.

Id. at 325. As the Court noted in *Schwarz*, the Bar's rules on adoption of legislative positions are designed to ensure that a position truly represents a consensus of a substantial majority of the Board. The rules require a two-thirds vote first on whether an issue is germane and, if so, on whether or not the proposed position should be

taken.[4] The Board itself is truly representative of the Bar as a whole, its members being elected "under an appointment formula that might well satisfy the federal courts." *In re Florida Bar Board of Governors' Action, supra* at 325.

In *Schwarz* the Court recommended that, in addition to meeting the criteria for determining germanity, the Board exercise caution to avoid taking legislative positions on issues "which carry the potential of deep philosophical or emotional division among the membership of the Bar." *The Florida Bar re Schwarz*, supra at 1097. The history of the Board's position on the merit retention position suggests that it has not been one of those types of issues. When it was adopted in 1990, the only time a vote count was recorded, the vote was 40 to 6.[5] Under its procedure

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[4] Rules Reg. Fla. Bar, 2-9.3; Standing Brd Policy 9-20.

[5] See Minutes of Meeting of Board of Governors, January 25, 1990.

for member objections to legislative positions, the Bar received only 3 objections for the 1988-90 biennium and 10 objections each, for the 1990-1992 and 1992-1994 biennia.

Petitioners incorrectly characterize the informational material distributed by the Bar prior to the last merit retention election. Petitioners state that the materials are an indirect effort "to support the reelection of justices and judges of the district courts of appeal" by publicly distributing "favorable information" about such candidates and that the Bar has done so "in connection with its political support of justices and judges in merit retention elections * * *." In reality, the Board took no vote favoring or opposing any candidate and the materials distributed are entirely neutral, suggesting no support for or opposition to any judicial candidate.[6] The materials,

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[6] The resolution forms themselves highlight the Board's careful distinction between the activities of the Bar itself,

copies of which are attached to the Petition as exhibits, include a pamphlet consisting of an explanation of how the merit retention system works and objective biographical sketches on each justice or judge standing for retention election.

In addition to the pamphlets, the Board sent to voluntary bar presidents and executives a packet of material for their use in assisting to educate the public as to the nature of merit retention elections. The packet included extracts from the Florida Constitution, Code of Judicial Conduct, and Florida Statutes applicable to merit retention elections, and the 1994 Bar poll results on merit retention candidates. The packet also included several generic fill-in-the blank forms for local voluntary bar associations to use should they decide to endorse particular judicial candidates. The materials are objective

---

not.

and informational and fall within the scope of the Schwarz criteria as "matters relating to the improvement of the functioning of the Courts, judicial efficacy and efficiency," and as matters about which "lawyers are especially suited by their training and experience to evaluate and explain."

The history of the public education campaign that generated the pamphlets and other materials is instructive. The idea of the program grew out of the recommendations of then Chief Justice Alan C. Sundberg who appeared before the Board of Governors in 1980 to urge that the Bar undertake a public information campaign regarding merit retention, specifically including distribution of judicial poll results and candidate information. [Exhibit A]. The question of whether the pamphlets were partisan or neutral was passed upon in 1990 by the executive office charged with the administration of Florida's election laws. The Division of Elections of the Florida Department of State, in response

to an inquiry from the Bar as to whether the pamphlets constituted a political advertisement or an in-kind contribution, concluded that they were neither. The Division stated:

> While the pamphlet does list information about the judges or justices which could be interpreted as making the person appear qualified for the judicial position, it is presented in a manner which is indifferent to the outcome of the vote. Therefore, it is the opinion of the Division that the pamphlets are not political advertisements which require disclaimers.
>
> ******
>
> [I]t does not appear that the pamphlets were made for the purpose of influencing the results of any of the retention elections mentioned in the pamphlets. Therefore, it is the opinion of the Division that the pamphlets are not in kind contributions which the judges or justices to report on their campaign treasurer's reports.
>
> [Exhibit B]

It if difficult enough for the lay public to make meaningful decisions regarding the selection of judges, a

matter involving issues about which most persons have little or not experience or knowledge. The suggestion that the group having the most experience and knowledge about the subject should be barred from sharing its collective observations with the public calls for a peculiar situation to say the least. *In re Florida Bar Board of Governors' Action, supra,* this Court cited as an example of the Bar's fulfillment of its public service obligation its support of the creation of the Judicial Qualifications Commission and the District Courts of Appeal, and the enactment of the Public Defenders Act. The Petitioners' position would logically have prohibited the Bar from taking a position on any of these issues. There is no meaningful distinction between an act dealing with the method of removing judges and one dealing with the method of selecting them. If lawyers are not especially suited to speak to the method of selecting judges, why are they any more suited to speak to the levels of courts or

the method of providing legal representation to the indigent.

The subjects which *Keller* and *Frankel* find to be not germane fell at the extreme end of the spectrum: polygraph tests for employees, prohibition of armor piercing handgun ammunition, air pollution, low rent housing, importation of foreign workers, a nuclear weapons freeze, school prayer, busing, medical coverage for pregnant women, immunization for children, and teen pregnancy prevention. The Petitioners are asking this Court to move the Bar to the extreme other end of the spectrum. They would reduce the Bar's participation to providing technical legal assistance on non-controversial, non-partisan, non-political issues. Such a result would deprive the Legislature and the public of a valuable resource and would radically alter the long recognized role of the Bar with respect to public issues:

If a matter vitally affects the public and lawyers are

> peculiarly fitted to evaluate it, it not only the right but the duty of the Bar as a professional organization to make such evaluation and advise the public of its conclusions.

In re Florida Bar Board of Governors' Action, supra at 325.

CONCLUSION

The Court is respectfully urged to deny the petition.

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Supreme Court, U.S.
FILED
MAY 23 1995
OFFICE OF THE CLERK

No. 94-1834

In The

Supreme Court of the United States

October Term, 1994

HARVEY M. ALPER, HENRY P. TRAWICK, JR., AND JOSEPH W. LITTLE,

Petitioners,

vs.

THE STATE OF FLORIDA (THE FLORIDA BAR),

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Florida

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Does the Petition present a substantial question when all of the issues raised have recently been addressed by this Court and the decision below is not in conflict with any decision of this Court or any other court which would justify the issuance of a writ?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

The Petition for Certiorari fails to present a substantial question justifying issuance of a writ in that all of the issues raised have recently been addressed by this Court and there is no conflict between the decision of the Court below and any decision of this Court or any other appellate court which would justify review 2

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Chicago Teachers Union v. Hudson, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).....3, 4

Gibson v. The Florida Bar, 502 U.S. 104, 112 S.Ct. 633, 116 L.Ed.2d 432 (1991).....3, 4

Gibson v. The Florida Bar, 906 F.2d 624 (11th Cir. 1990).....3

Keller v. State Bar of California, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990).....1, 4, 5, 6

Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990).....5

The Florida Bar re Frankel, 581 So.2d 1294 (Fla. 1991).....6

The Florida Bar re Schwarz, 552 So.2d 1094 (Fla. 1989).....5, 6

SUMMARY OF ARGUMENT

The decision below cannot be read, either directly or by implication, to be in conflict with any decision of this or any other court. The issues challenged below were no longer current programs of the Bar at the time of the challenge, and the Florida Supreme Court issued no opinion with its decision.

Even if the Florida Supreme Court had addressed the merits of the Petition, the case would present no issue worthy of this Court's review. The Bar's rules were held by the Eleventh Circuit to be in compliance with the procedural requirements announced by this Court and this Court found no flaw in the rules when it initially granted certiorari to review them and then dismissed.

This case presents no basis for review of the associational question left undecided in *Keller v. State Bar of California*. The Florida Supreme Court has restricted the political and ideological activities of The Florida Bar, whether or not funded by compulsory dues, to those which meet the criteria announced in *Keller*.

ARGUMENT

The Petition for Certiorari fails to present a substantial question justifying issuance of a writ in that all of the issues raised have recently been addressed by this Court and there is no conflict between the decision of the Court below and any decision of this Court or any other appellate court which would justify review.

The Florida Supreme Court rendered no opinion, expressed or implied.

The petition for certiorari argues that the decision below of the Florida Supreme Court conflicts with decisions of this Court relating to use of compulsory bar dues and, in addition, implicates the issue of compelled association. In the first place, the decision below neither states nor implies anything that could be determined to have been in conflict with a decision of this Court or any other court. In their petition filed with the Florida Supreme Court, the Petitioners challenged two activities engaged in by The Florida Bar. In its response, the Bar stated:

> Neither of the challenged activities involve current programs of the Bar. Standing Board Policy 9.20(d) provides that a legislative position adopted by the Board remains in effect for the biennial legislative session following its adoption, unless reversed or rescinded. The merit retention position last adopted by the Board lapsed in July, 1994 and has not been readopted since. The merit retention pamphlets which Petitioners complain of were last distributed prior to the November, 1994 election and no decision

> has been made by the Board with respect to future distribution of similar pamphlets.

Pet. App. 39a-40. The Florida Supreme Court denied the petition without opinion. *Pet. App.* 1a. The Court may well have denied the petition simply because the issues raised were not timely.

The Florida Bar's rules meet Constitutional requirements.

Even if the Florida Supreme Court had expressly upheld the positions being challenged by the Petitioners, it would raise no issue justifying review by this Court. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), this Court laid out the procedures which a bar must follow in order to fund political or ideological activities with compulsory bar dues without violating its members' First Amendment rights. In direct response to the *Hudson* decision, The Florida Bar adopted an elaborate procedural code specifically designed to comply with the *Hudson* requirements. Those procedures were reviewed and upheld by the Eleventh Circuit Court of Appeals in *Gibson v. The Florida Bar*, 906 F.2d 624 (11th Cir. 1990).[1] This Court initially granted certiorari to review the decision of the Eleventh Circuit. However, after receiving briefs and hearing oral argument, the Court dismissed the petition as having been improvidently granted. *Gibson v. The Florida Bar*, 502 U.S. 104, 112 S.Ct. 633, 116 L.Ed.2d 432 (1991).

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[1] The Bar's procedures were laid out verbatim in footnote 8 to the *Gibson* opinion.

The procedures reviewed in *Gibson*, among other things, provided for publication in The Florida Bar News, a newspaper distributed to every member, of notice of the adoption by the Board of Governors of the positions which the Petitioners now challenge. The rules allowed Petitioners 45 days in which to file objections with the Bar. Upon receipt of such objections, the Bar was required by its rules to promptly determine the pro rata amount of the objecting member's dues at issue and either return such amount to the members or place it in escrow pending a *Hudson* type hearing. The record does not reflect that the Petitioners ever filed objections to the positions as permitted by the rules.[2]

This case does not implicate associational rights.

In *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), this Court held that an integrated bar such as the State Bar of California could constitutionally use compulsory dues to fund activities which are germane to the State's interest in regulating the legal profession and improving the quality of legal services. The Court declined to decide the broader question of whether a lawyer could be compelled to associate with a bar which engaged in political or ideological activities which were not germane to such interests, but which were not funded by compulsory dues. The Petitioners herein state that this case implicates the associational

---

[2] In addition to the *Hudson* procedures, the Florida Supreme Court allows any member to file a petition directly with the Court to challenge a position of the Bar as being beyond the scope of its authority as defined by the Bar.

rights which the Court left open in *Keller*. They are incorrect.

As noted above, the decision below expressed no opinion, much less an opinion regarding the Petitioners' associational rights, and cannot be read to have implicitly addressed such rights. Furthermore, the scope of authority of The Florida Bar, as defined by the Florida Supreme Court, does not provide a foundation for this Court to address the associational issue.

There is a significant difference in the authority of The Florida Bar and the authority of both the State Bar of California, as discussed in *Keller*, and the Puerto Rico bar, as discussed by the First Circuit in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), cited by the Petitioners. The authority of the California and Puerto Rico bar associations at the time those cases were decided permitted them to engage in activities well beyond the scope of those which could be funded with compulsory bar dues. The authority of The Florida Bar, in contrast, has been circumscribed by the Florida Supreme Court so that its power to engage in political and ideological activities is no broader than its right to use compulsory dues to fund such activities.

In *The Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989), the Florida Supreme Court defined the outer limits of Florida Bar activity, and provided that any member in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a

timely petition directly with the Court.[3] This Court's decision in *Keller* was decided six months after *Schwarz*, and a year later the Florida Supreme Court analyzed the relationship of the two decisions in *The Florida Bar re Frankel*, 581 So.2d 1294 (Fla. 1991). It concluded that the outer limits of permissible political and ideological activity by The Florida Bar was not greater than the limits on funding of such activities with compulsory dues as set out in *Keller*.[4] Thus, because The Florida Bar is not permitted to engage in lobbying activities which are outside the *Keller* criteria, with or without the use of compulsory dues, no opportunity for addressing the associational issue is presented.

---

[3] The Florida Supreme Court has exclusive jurisdiction over regulation of attorneys' pursuant to Article V, Section 15 of the Florida Constitution.

[4] The Court found that the six lobbying activities challenged by the Petitioner were all beyond the scope of permissible Bar activity, ordered that the petitioner's pro rata share of dues be returned, and enjoined the Bar from continuing to engage in such activities.

CONCLUSION

The Court is respectfully urged to deny the Petition for Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 94 -- 1834

In The

Supreme Court of the United States

October Term, 1995

HARVEY M. ALPER, HENRY P. TRAWICK, JR., AND JOSEPH W. LITTLE,

Petitioners,

vs.

THE STATE OF FLORIDA (THE FLORIDA BAR),

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

---

PETITIONERS' REPLY BRIEF

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BEST AVAILABLE COPY

ARGUMENT

In the brief in opposition to the petition, the State of Florida argues that this Court should exercise its discretion to decline to grant the petition -- merely because the Florida Supreme Court declined to issue a written opinion explaining its reasons for denying relief in the proceeding below. This is new matter that boldly highlights the stranglehold the State exercises over the Petitioners' first amendment rights.

Petitioners' core complaint is that the State of Florida requires them to be named members of The Florida Bar, which is an agency of the Supreme Court of Florida, while authorizing and permitting The Florida Bar to promote the retention elections of the justices of The Florida Supreme Court, which "merit retention" reelections Petitioners' consistently oppose as a matter of principle. Furthermore, the State funds this promotion of

the justices' reelections from the mandatory dues the State imposes upon Petitioners as a condition of exercising the right to practice law. In addition, the State provides no mechanism to obtain a rebate from mandated dues to reimburse Petitioners for their share of the State's expenditures to promote merit retention elections of justices and judges. Finally, and most egregiously, as the State admits in its Brief in Opposition (p.p.5,6), the State has decreed that the Supreme Court of Florida is the sole agency of state government in which Petitioners must seek relief against unconstitutional conditions placed upon them by the political activities of The Florida Bar. See also, *The Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989).

In short, the argument of the State in opposition invites this Court to tighten the noose around the neck of Petitioners' constitutional rights. The State, through the Supreme Court of Florida, sets the limits on political

activities of its agent, The Florida Bar. The State also reserves to the Supreme Court of Florida the exclusive jurisdiction to review constitutional challenges to the political activities of the Florida Bar, including those pertaining to the elections of individual justices and judges. The State now suggests that it may isolate its judicial decisions from the review of this Court by the simple step of refusing to issue a written opinion when it denies petitions for relief from first amendment violations. This plainly demonstrates that the State is engaged in the kind of political activities that *Keller* suggests may violate the first amendment rights of compelled members in a mandatory bar.

Petitioners attached several exhibits to the initial petition reproducing *verbatim* the content of documents that the State, through The Florida Bar, widely distributed to promote the retention elections of justices of the Supreme Court of Florida and judges of the district court

of appeals. See Petition, Appendix B, Exhibits 2-6, 12, pp 15a-37a. To augment those exhibits, Petitioners attach hereto a verbatim copy of the content of promotional materials widely distributed by The Florida Bar to promote the retention elections of specific justices of the very court that denied relief to Petitioners in this case without opinion. These exhibits make plain that the State is involved in political activities entirely different in kind from those considered by this Court in *Keller* and that the State does not provide Petitioners an independent forum to protect their constitutional rights.

In short, Petitioners respectfully submit that this case squarely raises vital first amendment issues left open by *Keller* and needs the immediate review of this Court.

Respectfully submitted,

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APPENDIX A - EXHIBIT 1 *

SUPREME COURT OF FLORIDA
Statewide Jurisdiction

INTRODUCTION

Merit retention is a unique voting process that offers regular citizen review of our state's higher level judges, intended to keep quality individualson our state's higher level judges, intended to keep quality individuals on Florida's Supreme Court and five districtcourts of appeal. Since 1976 our State Constitution has required that these appellate court judges appear on the nonpartisan portion of the general election ballot for periodic voter approval of their continuation in office.

As part of that process, the November 8 elections will include - for consideration by every voter regardless of

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* This is a copy of a document produced and widely distributed by The Florida Bar in connection with 1994 judicialelections in Florida. [Footnote added by Petitioners for identification].

political party affiliation - the names of the chief justice and one other justice of the Florida Supreme Court, plus judges from a regional district court of appeal.

These appellate-level judges attain their offices through a "merit selection" system: a thorough public examination of their qualifications by a distinguished citizen commission that recommends them and other nominees for gubernatorial appointment. "Merit retention: complements that process, allowing voters a subsequent qualitative review of judicial performance - and the reconfirmation of each individual deemed worthy for further service on the bench.

In a merit retention campaign appellate judges face no opposing candidates; individual judges from the same court are not running against one another. Ballot language merely asks citizens to vote "Yes" or "No" on the question of whether each incumbent should be retained on a particular multi-member appellate court. Judges

receiving a majority of "Yes" votes may continue in office for another six-year term. If the "No" votes prevail for any individual, their position is declared vacant and is again filled through the merit selection process.

The appearance of these judges' names on the ballot implies nothing negative in their record - it is significant only because of Florida's special constitutional assurance of regular citizen approval of their continued judicial service. In fact, without some formalized opposition to their retention, appellate judges are forbidden by ethical rules to conduct any traditional campaign activity (unlike trial-level judges who may face opposition yet still run as nonpartisan candidates).

A truly responsible merit retention vote includes consideration of an appellate judge's legal ability, their knowledge of the law, integrity, temperament, reputation within the legal community, impartiality, freedom from bias or prejudice, demeanor, and courtesy. Ideally,

citizens need only verify that a judge is soundly interpreting the law, that their character is flawless, and their dispensation of justice is fair. Bar association polls, media endorsements and the recommendations of respected opinion leaders are additional indicators of a judge's true merit for retention in office.

STEPHEN H. GRIMES

BIRTHDATE: November 17, 1927
BIRTHPLACE: Peoria, Illinois
SPOUSE: Fay Fulghum Grimes
CHILDREN: Four
DEGREES: University of Florida, B.S., B.A. 1950; University of Florida J.D., 1954; Stetson University, Doctor of Laws (honorary), 1980.
LEGAL OFFICES & POSITIONS: Practiced law with Holland & Knight, 1954-73; Judge, Second District Court of Appeal, 1973-87 (Chief Judge, 1978-80); Justice, Supreme Court of Florida, 1987-present (Chief Justice, 1994-present).
BAR OFFICES & ACTIVITIES: Member of The Florida Bar, American Bar Association, Tenth Judicial Circuit Bar Association (President, 1966); Florida Bar Appellate Rules Committee, 1974-77, 1984-87 (Vice Chair, 1976); Supreme Court Appellate Structure Commission, 1979; Florida Council on Criminal Justice, 1979-82; Supreme Court

Committee on Florida Standard Jury Instructions in Criminal Cases, 1977-87 (Chair, 1985-87); Florida Bar Tort Litigation Review Commission, 1985; Supreme Court's Restructure commission 1985-86; Chair, Judicial Council of Florida 1989-94; Article V Task Force 1994-present.
OTHER CIVIC ACTIVITIES: U.S. Navy 1951-53; District Governor of Rotary International, 1960-61; President of greater Bartow Chamber of Commerce, 1964; Director of Bartow Memorial Hospital, 1957-60; Board of Trustees of Polk Community College, 1967-70 (Chair, 1969); Board of Directors of Bartow Public Library, 1968-78; Board of Governors of Polk Public Museum, 1978-present; former Vice Counsel of Episcopal Diocese of Central Florida.
HONORS & AWARDS: Chair of Florida Conference of District Court of Appeal Judges, 1978-80; Judicial Fellow American College of Trial Lawyers; Who's Who in America, 1970-present.
PUBLICATIONS: Editor-in-Chief, University of Florida Law Review (1951).

GERALD KOGAN

BIRTHDATE: May 23, 1933
BIRTHPLACE: New York, New York
SPOUSE: Irene Vulgan Kogan
CHILDREN: Three, 4 Grandchildren
DEGREES: University of Miami, B.B.A. and J.D. 1955
LEGAL OFFICES & POSITIONS: Assistant State Attorney, Eleventh Judicial Circuit, 1960-67 (Chief Prosecutor

Homicide and Capital Crimes Division, 1964-67); Special Counsel, Florida Legislature's Select Committee on Organized Crime and Law Enforcement, 1968-69; Circuit Court Judge, Eleventh Judicial Circuit of Florida, 1980-87 (Administrative Judge, Criminal Division, 1984-87); Justice, Supreme Court of Florida, 1987 to present (Chair, Supreme Court of Florida 1987-present (Chair, Supreme Court Gender Bias Study Commission, 1987-present); Vice-Chair Bench/Bar Commission and Chair Bench Bar Implementation Committee.

BAR OFFICES & ACTIVITIES: Special Prosecutor and Referee in Florida Bar Disciplinary Pro-Florida Bar Committees - Grievance Committee, Eleventh Judicial Circuit; Unauthorized Practice of Law Committee; Dade County Bar Association Criminal Court Committee.

OTHER CIVIC ACTIVITIES: Faculty Member, American Academy of Judicial Education, 1981-present; Former Adjunct Faculty Member of University of Miami School of Law and Nova University Center for the Study of Law; Faculty of the Trial Judges Academy at University of Virginia, 1986; Teaches Trial Advocacy Programs at University of Florida School of Law for Prosecutors and Public Defenders; Adjunct Faculty - FSU School of Law.

HONORS & AWARDS: Selig I. Goldin Award, 1988.